No. 97-686

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETE WILSON, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents*.

STATE OF CALIFORNIA, et al., *Petitioners*,

v.

DERRICK CLARK, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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14 pp

TABLE OF CONTENTS

	Page
PETITIONERS' REPLY BRIEF	1
ARGUMENT	2
I. THE ISSUE OF THE APPLICABILITY OF THE STATUTES TO THE STATES' MANAGEMENT OF THEIR CONVICTED FELONS.	2
II. THE ISSUES REGARDING THE STATES' ELEVENTH AMENDMENT IMMUNITY.	4
A. Congress's Power to Abrogate the States' Eleventh Amendment Immunity.	4
B. The *Ex parte Young* Exception to Eleventh Amendment Immunity.	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

Cases

City of Boerne v. Flores
117 S. Ct. 2157 (1997) 5

City of Cleburne v. Cleburne Living Ctr.
473 U.S. 432 (1985) 5

Idaho v. Coeur d'Alene Tribe of Idaho
117 S. Ct. 2028 (1997) 8

Katzenbach v. Morgan
384 U.S. 641 (1966) 5

Lane v. Pena
116 S. Ct. 2092 (1996) 6, 7

TABLE OF AUTHORITIES, CONT'D

Statutes

20 United States Code
§ 1681 et seq. 6

29 United States Code
§ 794 6

42 United States Code
§ 2000d-7(a)(1) 6
§ 2000d et seq. 6
§ 6101 et seq. 6

Regulations

28 Code of Federal Regulations
§ 35.105 2
§§ 35.105-107 5
§ 35.150(d) 5

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PETITIONERS' REPLY BRIEF

This petition presents the Court with the best vehicle to resolve the conflict among the circuits concerning the applicability of the statutes to the States' management of their convicted felons and to address critical issues concerning the application of the Eleventh Amendment. The Court should resolve these important matters this Term by granting this petition.

ARGUMENT

I.

THE ISSUE OF THE APPLICABILITY OF THE STATUTES TO THE STATES' MANAGEMENT OF THEIR CONVICTED FELONS.

The need to resolve the conflict among the circuits concerning the applicability of the statutes to the States' management of their convicted felons is pronounced and clear. In its brief, the United States recognizes that the conflict should be resolved by the Court (Brief of the United States, p. 19), but suggests that it should be addressed in a different case. The suggestion should be rejected.

This petition presents the Court with the best vehicle for the resolution of the conflict for several reasons. First, by granting this petition the Court can resolve the conflict regarding the applicability of *both* the ADA *and* the Rehabilitation Act. Second, issues of federalism are more acutely implicated in this petition. In *Armstrong*, the district court concluded that not only are the statutes applicable to the States' management of their convicted felons, but so too are intrusive federal regulations.[1] In *Clark*, the State of California is expressly named as a party. And both *Armstrong* and *Clark*

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1. The injunction entered in *Armstrong* required the California Department of Corrections, among other burdens, to perform a self-evaluation of its operations and facilities as prescribed in 28 C.F.R. § 35.105. Appendix 78a. Principles of federalism are more severely strained when the Federal Government disturbs the balance of powers by imposing regulatory, as opposed to congressional, mandates on the States. No other petition pending before the Court involves the imposition of federal regulations on state prison management.

implicate not just prisoners, but also parolees, which provides the Court with the opportunity to relate the statutes to the more comprehensive state interest of managing convicted felons. Finally, both *Armstrong* and *Clark* are class actions in which extraordinarily wide-ranging relief has been sought and, in the case of *Armstrong*, partially granted. This relief imposes serious disruptions in the management of the largest state prison system, and requires the expenditure of millions of dollars of limited state funds.

This petition should not be held pending the Court's determination of the petitions in *Commonwealth of Pennsylvania Dep't of Corrections v. Yeskey*, No. 97-634, or *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, No. 97-___, as suggested by the United States (Brief of the United States, p. 22). *Yeskey* only involves the applicability of the ADA, and not the Rehabilitation Act. Granting the petition in that case while holding this one would be an ineffective method to resolve the separate conflict among the circuits concerning the applicability of the Rehabilitation Act. In addition, neither *Yeskey* nor *Amos* involve the application of federal regulations or are based on factual records. Those cases simply fail to present as comprehensive or compelling reasons for review as are presented in this petition.

Accordingly, the Court should take the opportunity to resolve the conflict among the circuits this Term by granting this petition.

II.

THE ISSUES REGARDING THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The conclusions of the Ninth Circuit that the statutes were properly enacted pursuant to the Fourteenth Amendment and that *Ex parte Young* provides an exception to the state officials' Eleventh Amendment immunity conflict with decisions of the Court and involve important issues that have not been, but should be, settled. Because the need for guidance from the Court on these issues is acute, the Court should grant certiorari on the Eleventh Amendment questions presented.

A. Congress's Power to Abrogate the States' Eleventh Amendment Immunity.

The Ninth Circuit's decision in *Clark* should be reviewed because it conflicts with decisions of the Court and sanctions the exercise of ever-expanding and unreviewable congressional power over essential areas of state sovereignty. In its brief, the United States contends that the statutes were enacted pursuant to the Fourteenth Amendment because Congress made findings that persons with disabilities have experienced discrimination. (Brief of the United States, pp. 11-16). The argument is overly simplistic and misunderstands the limitations on Congress's authority under principles of federalism and separation of powers. A congressional finding that a group of persons has experienced some form of discrimination does not establish that any related legislation is authorized by the Fourteenth Amendment.

The Court already has determined that although persons with disabilities may have experienced forms of discrimination, they "have not experienced a history of

purposeful unequal treatment." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (internal quotations omitted). Congress cannot disregard the Court's determination, generate its own findings, and then on that basis enact legislation expanding its authority under the Fourteenth Amendment. Contrary to the United States' argument, Congress does not have the power to unilaterally determine the scope of its dominion over the States under the Fourteenth Amendment. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163-64 (1997).

Even if Congress were empowered to enact legislation against the States directed at discrimination of persons with disabilities, the statutes at hand are excessively and unconstitutionally intrusive, especially when applied to the States' sovereign interest in managing convicted felons. By requiring affirmative obligations, the statutes do much more than merely prohibit discrimination. Furthermore, the regulations promulgated under the statutes impose extraordinarily intrusive burdens that are at best indirectly related to matters of discrimination. These burdens include obligations to implement a grievance procedure, provide notice, conduct a self-evaluation, develop a transition plan, and assign a coordinator. 28 C.F.R. §§ 35.105-107, 35.150(d). These requirements go far beyond anything that reasonably could be authorized by the Fourteenth Amendment, and are inordinately intrusive when applied to the States' management of their convicted felons. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

The oppositions attempt to evade the issue of Congress's authority to enact the Rehabilitation Act under the Fourteenth Amendment by arguing erroneously that California waived its Eleventh Amendment immunity by

accepting federal funds (Brief of *Clark* Respondents, pp. 10-11; Brief of the United States, pp. 17-18).[2] Petitioners have never disputed that in passing 42 U.S.C. § 2000d-7(a)(1) Congress expressed an intent to abrogate Eleventh Amendment immunity.[3] But petitioners have consistently challenged Congress's power to effectuate such an abrogation. Nowhere in the Rehabilitation Act does it state, much less in an unequivocal manner, that by accepting federal funds States waive their Eleventh Amendment immunity. California simply cannot have waived its Eleventh Amendment immunity under the Rehabilitation Act merely because it accepted federal funds.

The argument that § 2000d-7(a)(1) implicates a waiver of the States' Eleventh Amendment immunity because of a reference to the provision by the Court in *Lane v. Pena*, 116 S. Ct. 2092 (1996), is wrong. (Brief of *Clark* Respondents, p. 9.) In *Lane*, the question was "whether Congress has waived the Federal Government's sovereign immunity against the imposition of monetary damages for violations of [the Rehabilitation Act]." *Id.* at 2095. In concluding that there was no such waiver the Court stated:

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2. The claim under the Rehabilitation Act in *Clark* is expressly asserted against the State of California. Thus, Congress's authority to abrogate Eleventh Amendment immunity is squarely presented and cannot be avoided even arguably under the *Ex parte Young* exception to Eleventh Amendment immunity.

3. Section 2000d-7(a)(1) states that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."

> Given the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in § 1003, it would be ironic indeed to conclude that the same provision "unequivocally" establishes a waiver of the Federal Government's sovereign immunity against monetary damages awards by means of an admittedly ambiguous reference to "public . . . entit[ies]" in the remedies provision attached to the unambiguous waiver of the State's sovereign immunity.

Id. at 2100. Although the Court used the term "waiver," the passage is an expression that the section reflects a congressional intent to *abrogate* the States' Eleventh Amendment immunity. The Court's comment does nothing to support a conclusion that California waived its Eleventh Amendment immunity under the Rehabilitation Act by accepting federal funds.[4]

The Ninth Circuit's conclusion that the statutes were properly enacted pursuant to the Fourteenth Amendment conflicts with decisions of the Court and highlights the critical need for guidance from the Court. This petition should be granted to address these important issues this Term.

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4. For the same reasons, it is disingenuous for the *Clark* respondents to argue that the Ninth Circuit's conclusion that California waived its Eleventh Amendment immunity constitutes an independent ground to sustain the appellate decision regarding the Rehabilitation Act (Brief of *Clark* Respondents, pp. 9-11). This petition squarely challenges Congress's power to abrogate the States' Eleventh Amendment immunity.

B. The *Ex parte Young* Exception to Eleventh Amendment Immunity.

The Ninth Circuit's conclusions in *Armstrong* and *Clark* that *Ex parte Young* provides an exception to the state officials' Eleventh Amendment immunity should be reviewed because they conflict with decisions of the Court and authorize the Federal Government to exercise complete dominion over areas essential to state sovereignty.

The oppositions argue that *Ex parte Young* provides an exception to California's Eleventh Amendment immunity because the complaints sought injunctive relief against state officials. (Brief of *Armstrong* Respondents, pp. 16-17; Brief of *Clark* Respondents, p. 13; Brief of the United States, pp. 18-19). In doing so, the oppositions "adhere to empty formalism and . . . undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2034 (1997).

Armstrong and *Clark* are comparable to the situation presented in *Coeur d'Alene* because they are entirely unlike a typical *Ex parte Young* action. California's management of its convicted felons is an essential attribute of its sovereignty. If the Federal Government is permitted to force statutory and regulatory mandates intended for general societal application onto the States' management of their convicted felons, and if these mandates are permitted to be enforced in federal court under *Ex parte Young*, the Federal Government is empowered to completely usurp an area essential to state sovereignty. Such an interpretation of federal powers must be rejected.

The Ninth Circuit's conclusions that *Ex parte Young* provides an exception to the state officials'

Eleventh Amendment immunity involve important issues that have not been, but should be, settled. The need for plenary review of the Eleventh Amendment questions presented in this petition is critical, and the Court should grant this petition to address these important issues this Term.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 26, 1997.

Respectfully submitted,

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